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Federal Communications Commission
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**ARCH COMMUNICATIONS GROUP, INC.
and PAGING NETWORK, INC.**

For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses

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) WT Docket No. 99-365,
) File No. 0000053846, *et al.*
) DA 99-3028

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To: Chief, Wireless Telecommunications Bureau

**OPPOSITION TO
MOTION FOR STAY PENDING RECONSIDERATION**

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To: Chief, Wireless Telecommunications Bureau

**OPPOSITION TO
MOTION FOR STAY PENDING RECONSIDERATION**

Paging Network, Inc. and its licensee subsidiaries (collectively, "PageNet"), by its attorneys and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the Motion for Stay Pending Reconsideration ("Motion") filed by Metrocall, Inc. ("Metrocall") on October 4, 2000. Metrocall's Motion seeks to stay the effectiveness of the April 25, 2000 order issued by the Federal Communication Commission ("FCC") approving the above-captioned transfer of control applications to effectuate a merger between PageNet and Arch Communications Group, Inc. ("Arch")¹ pending a Commission decision on Metrocall's Petition for Reconsideration or Informal Complaint that was filed on September 12, 2000, as supplemented on September 18, 2000 ("Petition"). One might have thought that Metrocall's Petition epitomized a frivolous pleading but Metrocall here has surpassed itself by filing this absurd Motion. As shown below, Metrocall has no legal basis for requesting a stay and even were that not the case, it has failed to meet any standard for granting a stay. In particular,

¹ Arch recently has changed its name to Arch Wireless, Inc. but for consistency we will refer to it herein by its former name.

Metrocall has failed to demonstrate that it or the public will suffer irreparable harm if a stay is not granted or that it is likely to prevail in its legal challenge. It is apparent that Metrocall's Motion has been filed solely in the hope of creating confusion and delay in PageNet's pending bankruptcy proceeding.

1. Metrocall's Motion for Stay Is Contrary to Law

Metrocall claims that it is filing its stay request pursuant to Section 405(a) of the Communications Act and Sections 1.43 and 1.429(k) of the Commissions rules. Section 405(a) provides for a stay where a party has filed a petition for reconsideration. Here, as shown in PageNet's Motion to Dismiss, no such petition was filed, only an informal complaint attempting to masquerade as a valid petition for reconsideration. Section 1.43 of the rules does not confer a right to file a motion for stay and Section 1.429(k) only provides for a stay in rulemaking proceedings. Accordingly, this motion may be summarily dismissed.

As PageNet previously has shown, there is no legal basis for the Commission to address Metrocall's so-called petition for reconsideration because the Commission's action approving the merger between Arch and PageNet has become final. Finality would have no meaning if the Commission were able to stay an action that has become final and the Commission has no jurisdiction to do so. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). In its Motion, Metrocall nevertheless continues to argue, by relying on additional inapposite cases, that the Commission has authority to stay any further action pending consideration of its petition for reconsideration. *See* Motion at 8. The allegations made by Metrocall in this case simply do not bear any similarities to the cases cited by Metrocall where grant of an application was made through inadvertent error, *cf.* *Communications and Control, Inc.*, 15 FCC Rcd. 5428 (2000), or where there were serious allegations of Executive Branch influence and Commission impropriety in a renewal proceeding

that would undercut “the integrity of the administrative or judicial process” *cf Brandywine Main-Line Radio, Inc.*, 60 FCC2d 755 (1976), *citing Greater Boston Television Corporation*, 463 F.2d 268, 291 (D.C. Cir. 1971).² Obviously, there is no need to issue a stay to provide time for the consideration of a petition for reconsideration which may not be granted and Metrocall’s Motion therefore should be dismissed. Moreover, as shown below, even if there were some legal basis for consideration of this Motion, it could not be granted.

2. The Commission Evaluates Petitions for Stay Under Well-Established, Judicially Approved Standards

The Wireless Telecommunications Bureau (the “Bureau”), acting under delegated authority, can stay an action pending the disposition of a valid petition for reconsideration. *See* 47 C.F.R. § 1.102(b)(2). However, the Bureau’s authority to grant a stay is not unfettered. Although the Commission has declined to adopt a single standard for stay requests, it nevertheless evaluates petitions for stay under well-established, judicially approved standards. *See, e.g., Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services*, 15 FCC Rcd 7051, ¶7 (1999); *Station KDEW(AM)*, 11 FCC Rcd 13683, ¶6 (1996); *Amendment of Section 1.420(f) of the Commission’s Rules*, 11 FCC Rcd 9501, n.21 (1996); *Implementation of Sections of the Cable Act of 1992*, 8 FCC Rcd 5585, ¶8 (1993).

To support a request for stay, a petitioner generally must demonstrate: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay. *See Implementation of Cable Act of 1992*, 8 FCC Rcd 5585, ¶8, *citing Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985); *Washington Metropolitan*

² In the third case cited by Metrocall, *Central Alabama Broadcasters, Inc.*, 48 FCC2d 998 (1974), the Commission refused to treat the untimely pleading as a petition for

Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The Commission balances the four criteria on a case-by-case basis. *See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services*, 15 FCC Rcd 7051, ¶ 7 (1999). If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors. *Id.*

3. Metrocall Has Failed to Make the Necessary Showing for Granting a Stay

As explained below, review of the Motion reveals that Metrocall has completely failed to make any showing that a stay is appropriate under any of the four criteria, and therefore, the Bureau must deny Metrocall's request.

A. Success on the Merits. Metrocall has not made any express claim that it expects to prevail in its pending legal challenge. Rather, it merely claims that grant of the stay in this instance will provide the Commission with an opportunity to review Metrocall's pending petition and craft an order that will address the issues raised in the Petition prior to consummation of the merger. *See* Motion at 5. Even if the Commission were to consider Metrocall's claim on the merits, Metrocall has clearly failed to present sufficient evidence to show that it would prevail. Metrocall claims that it is illegal for Arch to agree with its lenders to pay down its outstanding loans by \$110 million within one year after consummating the merger because the funds to do so may include proceeds from the sale of certain licenses. *See* Motion at 3. Metrocall argues that this covenant provides the lenders with so much power over the licenses that this provision effectively constitutes an unauthorized transfer of negative control of FCC

reconsideration but found that it had jurisdiction to consider the allegations under Section 319(c) of the Act, a provision not applicable here.

licenses to the lenders.³ As shown in PageNet's Motion to Dismiss, Metrocall has not identified a single case where the Commission has found an unauthorized transfer of control that involves facts even remotely comparable to this situation. As PageNet has shown, the credit agreement does not give the lenders control over the use or operation of any of Arch's post-merger assets or licenses, its bank accounts, employees, customers, services, rates, practices or policies. Metrocall's arguments concerning an unauthorized transfer of control are totally devoid of support in the facts, law or policy.

Metrocall also now argues for the first time that certain language in paragraph 8 of the "Final Order Authorizing Debtors in Possession to Enter into Post-Petition Financing" (the "DIP Financing Order"), entered by the Bankruptcy Court on September 7, 2000, is contrary to applicable FCC precedent. *See* Motion at 4. Even if Metrocall's allegations were true, the court's order is unrelated to the merger between Arch and PageNet and therefore can not serve as the justification for a stay of the merger.⁴

³ Far from having an interest in FCC Licenses, the lenders here have an interest only in the proceeds of the sale of assets, which may include licenses. *See* Exhibits 1-4 of Metrocall's Petition. Under well-established precedent, a licensee such as Arch may grant an interest in the proceeds from the sale of a license to a lender. *See In re Cheskey*, 9 FCC Rcd 986, 987 (1994) (holding that licensee may give security interest in the proceeds of sale of license, but not in the license itself).

⁴ In citing the DIP Financing Order, Metrocall once again is grasping at straws. In the order, the court is merely granting a security interest in PageNet's assets to parties advancing funds to PageNet during the bankruptcy proceeding. The language referred to by Metrocall appears to be boilerplate and grants a lien on "all currently owned or hereafter acquired property or assets of the Debtors ... and all proceeds, products, rents and profits thereof, **including**, without limitation, ... trademarks, trade names, licenses, causes of action" DIP Financing Order at ¶ 8 (emphasis added). The order makes no specific reference to FCC Licenses and, because FCC licenses, as a matter of law, are not assets of a debtor that can be subjected to a lien, the court's reference to "licenses" can only refer to other types of licenses. Under the terms of the Amended Bankruptcy Plan, the DIP Financing Order must be satisfied before the bankruptcy plan is consummated. *See* Exhibit One of Metrocall's Reply to Opposition to Petition for Reconsideration or Informal Complaint. Accordingly, under the Amended Bankruptcy Plan, the DIP Financing Order will end upon consummation of the merger.

Finally, even if the specific provisions in the credit facility or DIP Financing Order were found to be improper, which is not the case here, the appropriate remedy would be to require amendment of the credit agreement or the order, not disapproval of the merger. *See AirGate Wireless, L.L.C.*, 14 FCC Rcd 11827, ¶¶ 17, 53 (1999). Article XII, Section D of the Amended Plan contains an express provision to allow for modifications to the plan to “remedy any defect or omission or reconcile any inconsistency in the Plan.” Accordingly, to the extent that the Commission would find it necessary that the Amended Plan be modified in order to comply with Commission policy or precedent, such modification could easily be accommodated.

In an attempt to support its claim that the Commission may grant a stay even where the petitioner has not shown a likelihood of success on the merits, Metrocall has relied on cases that actually refute its claims. In *Angeles Broadcasting Network*, 59 RR2d 758 (1985), the basis for the grant of a stay was to avoid disrupting service to the public. Here, the merger would assure continuation of PageNet’s service to the public, not its termination. In *Arizona Mobile Telephone Company*, 66 FCC2d 691 at ¶ 13 (1977), also cited by Metrocall, the Commission expressly held that “[a stay] order could not be issued unless a determination was first made that it was likely the petitioner would prevail on the merits and the public interest required such action.” In a particular case, one or more of the factors may have more importance, especially where a stay would affect the public interest, but in this case, Metrocall has utterly failed to make a convincing demonstration that any of the four factors requires a stay here.

B. Irreparable Harm to Metrocall. Metrocall claims only in a footnote that it will suffer irreparable harm if the stay is not granted because it will be precluded from presenting its own amended plan to the Bankruptcy Court. *See* Motion at n.4. Metrocall’s claim is now moot.

On October 5, 2000, the U.S. Bankruptcy Court in Delaware denied Metrocall's bid to file a competing reorganization plan for PageNet.⁵ A stay will not reverse the court's decision, and any claim by Metrocall of irreparable harm as a basis for its motion for stay no longer survives. Moreover, the loss of an opportunity to acquire a competitor is at most an economic injury, not irreparable harm.

C. Injury to Other Parties. In its Motion, Metrocall asserts, without explanation, that in the event that the Commission would find it necessary to order the parties to cure defects after the Arch/PageNet merger was consummated, there would be "financial harm, and further unnecessary delays" to "PageNet's bondholders, creditors and shareholders." Motion at 4. The only defects Metrocall has identified are provisions in the credit agreement and the DIP Financing Order. Metrocall has not shown why the Commission would be unable to require modification of those provisions in the highly unlikely event it deemed modification necessary or how such a modification would harm other parties. Contrary to Metrocall's assertions, it is the grant of a stay which would cause harm to other parties in this case. To the extent that Metrocall is successful in delaying the bankruptcy court's consideration and approval of the merger or its consummation, which is the sole goal of Metrocall's various filings, severe harm would be caused to PageNet as set forth in its Motion to Dismiss. In addition, the Creditors' Committee, representing PageNet's creditors, has supported the merger and rejected Metrocall's attempts to inject itself into the bankruptcy proceeding.

D. Public Interest. Finally, Metrocall argues that the issues it raises bear directly on the qualifications of Arch, and therefore, the public interest requires that these issues be addressed prior to consummation of the merger. See Motion at 6. Assuming that the

⁵ See *Telecommunications Report International, Inc.*, TR Daily, October 6, 2000.

Commission somehow had the power to stay consummation of the merger,⁶ no facts have been presented which would warrant its doing so. In the order approving the merger, the Commission found that Arch was qualified to be a Commission licensee. Even construing Metrocall's allegations most favorably to it, an agreement by Arch with its lenders to sell SMR licenses to pay down a portion of outstanding loans would not be the type of action which, if ultimately found to somehow be improper, would impact upon Arch's basic qualifications to be a licensee. The Commission has made it clear that it considers alleged violations of law only in order to predict a person's truthfulness and reliability as a licensee.⁷ In analyzing alleged violations the Commission considers the willfulness and frequency of the alleged violation and its currency. It also considers the seriousness of the alleged misconduct. *Policy Statement* at 1227-8. PageNet believes it obvious that there has been no transfer of control to Arch's lenders, but given the fact that Metrocall has not been able to find a single relevant precedent, this would be a case of first impression and applying the precepts set forth above the alleged violation would not indicate a lack of truthfulness or reliability calling into question Arch's qualifications. The public interest, on the other hand, would be harmed by a stay here, as such action would only serve to delay the merger of Arch and PageNet, extend PageNet's bankruptcy status, and create further uncertainty as to the continuation of to PageNet's more than eight million customers.

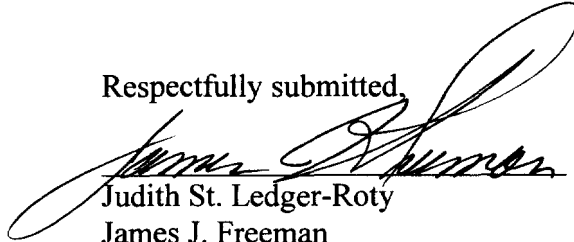
⁶ *Roy M. Speer*, 11 FCC Rcd. 14684 (1996), the case cited by Metrocall, involved a stay of an FCC grant that had not yet become final.

⁷ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1183, 1188-9 (1986)(hereinafter, *Policy Statement*).

4. Conclusion

Judged against the any of the criteria relevant to the grant of a stay, Metrocall has not met its burden for obtaining one. For the foregoing reasons, PageNet respectfully requests that the Commission deny Metrocall's Motion for Stay Pending Reconsideration.

Respectfully submitted,



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October 11, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Opposition to Motion for Stay Pending Reconsideration was hand delivered this 11th day of October, 2000, to the following:

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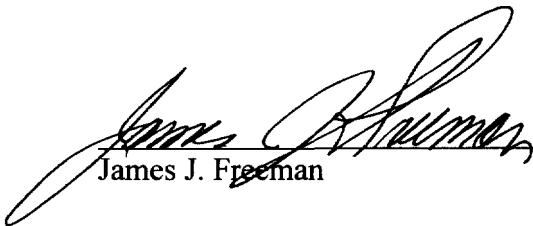
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